IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1230 OF 2004

Marappa @ Gurusidha Bhimrao
Padavale .. Appellant
(Orig.Accused No.1)

Versus

State of Maharashtra .. Respondent

Mr.P.R.Arjunwadkar for appellant
Mr.R.Y.Mirza, A.P.P. for State.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 11th/12th September 2006.

ORAL JUDGEMENT:-

. This Criminal Appeal is by the original

accused No.1 challenging the judgement and order delivered by the IIIrd Ad-hoc Assistant Sessions Judge, Solapur dated 31st August 2002 in Sessions Case No.103 of 2002. Learned Sessions Judge has convicted the Appellant under section 366 read with 34 I.P.C. and sentenced him to undergo rigorous imprisonment (RI) for two years and fine of Rs.500/- and in default of payment R.I. for fifteen days. Further, the learned Judge has convicted the appellant for offences punishable under sections 376 of I.P.C. and sentenced him to undergo R.I. for seven years and fine of Rs.500/- with identical stipulation in Default of payment. Learned Judge has also convicted the appellant under section 354 of I.P.C. and sentenced him to R.I. for three months and fine of Rs.250/- and in default to undergo R.I. for one week. It is directed that the sentences passed against him shall run concurrently.

2. Prosecution’s case in brief is as under:-

. Prosecutrix/victim, whose name need not be set out in accordance with the judgement of the Supreme Court, was residing along with her mother Vimal who is accused No.2 and brother Ganesh at Ambika Nagar, Village Bale in Solapur Dist. It is alleged that she was studying in Yashoyash School at Village Bale in VIth Std. It is alleged that the appellant was teaching Mathematics to standard VI in which the prosecutrix was pursuing her studies. It is further alleged that the appellant insisted on marrying the prosecutrix/victim. It is alleged that the appellant used to embrace the prosecutrix/victim in the class room and, therefore, she stopped attending school since October 2000. Further, the appellant was residing near the house of victim. Accused No.2 who is mother of the prosecutrix was working as his cook. It is alleged that after the victim/prosecutrix gave up education at the

school, yet, the appellant was coming to her house. Her brother used to object to his visits at their house. It is alleged that the mother also asked the accused No.1 to change his residence. For about 15 days before the incident, the appellant shifted his residence to Nehru Nagar. However, even thereafter, he was visiting the house of paternal aunt of prosecutrix, Kaveri, who is residing adjacent to the house of prosecutrix and was also discussing something with the accused No.2.

. On 21st December 2000, the mother (A-2) asked the prosecutrix to accompany her. It is alleged that she told the prosecutrix that she will have to marry accused No.1 - appellant before me. Accordingly, accused No.2 took the prosecutrix to Nehru Nagar Bus stop where the appellant was waiting for them. The appellant took accused No.2 and the prosecutrix to his house. He put Mangalsutra around prosecutrix's

neck and a chain on her ankle/foot. After taking lunch, the appellant accused took accused No.2 and prosecutrix to his maternal uncle's house at Village Chanegaon Taluka Indi Dist.Vijapur. The allegation is that appellant introduced the prosecutrix as his wife to his maternal uncle Parsappa Pujari. The prosecutrix and the appellant stayed in the house of said Pujari. It is alleged that after dinner, the appellant and the mother of prosecutrix so also the prosecutrix went to bed in one room. Later at night, the appellant had forcible sexual intercourse with the prosecutrix.

3. On 22nd December 2000 at about 7.00 a.m. the maternal uncle of the appellant Parsappa Pujari took the prosecutrix and appellant No.2 to the house of one Suresh Patil. Suresh Patil made enquiry with the prosecutrix whether she was ready to marry the appellant. The prosecutrix told the said Suresh Patil that she would consult

her brother and, thereafter, decide about her marriage. After this, the maternal uncle of the appellant asked prosecutrix and appellant to return back to Solapur. Accordingly at 7.00 p.m. on 22nd December 2000, prosecutrix and the appellant returned to Solapur.

4. Prosecutrix went to the house of her grandfather Shrikrishna Sutrale who resides at Manjusha Society and met her brother Ganesh. She narrated the incident to her brother. He confirmed the incident from mother accused No.2. Thereafter, on 23rd December 2000 the brother brought the prosecutrix to Navipeth Police chowky where she lodged F.I.R. Exh.15.

5. Officer of the police station of Navipeth Police chowky sent the F.I.R. to Vijapur Naka Police station because, according to him, offence was committed within jurisdiction of Vijapur Naka police station. Accordingly, the offence was

registered at Vijapur Naka police station on 24th December 2000. During investigation, the concerned police officer noticed that the offence had been committed at Village Bale and Nehrunagar and both places are within the jurisdiction of Fauzdar Chowdi police station. Accordingly, on 25th December 2005 Crime No.293 of 2000 came to be registered at Fauzdar chawdi police station.

6. The prosecutrix was referred to medical examination at civil hospital, Solapur. The appellant came to be arrested and he was referred to medical examination. I.O. P.W.4 seized Mangalsutra and Ankle chain from the prosecutrix in the presence of Panch witnesses. Prosecutrix showed the scene of offence to the police. Accordingly the I.O. prepared Panchanama of scene of offence (Exh.18) in the presence of Panch witnesses. Clothes of the appellant as also the prosecutrix were seized in the presence of Panch witnesses (Exh.27 and 28). I.O.

recorded statement of witnesses. He seized school leaving certificate of the prosecutrix (Exh.22) and leave application of the appellant (Exh.23) from the custody of Headmaster of Yashoyash school. Seized muddemal property has been sent to chemical analyst. I.O. received the medical certificate of the prosecutrix and the appellant (Exh.16 and 17 respectively). He also received report of C.A. (Exh.30 and 31). After completion of investigation, charge sheet came to be filed against the appellant in the Court of Judicial Magistrate, Solapur who inturn committed the same to the court of sessions under section 209 of Cr.P.C.

7. Initially both accused were enlarged on bail but subsequently, they remained absent and therefore, they were arrested under execution of warrants and since then, they are in custody.

8. Learned Assistant Sessions Judge to whom

the case was committed for trial framed charges against both accused for offences punishable under the above referred provisions of I.P.C. In addition, as far as appellant is concerned, charge was framed against him for offence punishable under (Outraging of Modesty and Rape) section 354 and 376 vide Exh.2. Accused pleaded not guilty and claimed to be innocent. In other words, he claimed to be tried.

9. Defence of the appellant in the case is that he is falsely implicated therein because he refused to marry the prosecutrix/victim. The brother of victim was insisting on his doing so. He specifically denied the charge of rape and all allegations in that behalf. The mother was also named as accused No.2 and it is her defence that she had advised prosecutrix to marry the appellant which she refused and, therefore, she is falsely implicated in this case.

10. P.W.1 was naturally the prosecutrix. In her deposition she has stated that she was studying in Yashoyash Highschool Bale in VI std. She resides along with her mother Vimal, sister Suman and brother Ganesh. Her mother was working as a cook and brother was working at stationary shop at Solapur. Appellant was her Maths teacher. He used to reside in a house adjacent to her place as a tenant. Mother of prosecutrix used to prepare food for the appellant in his house. She stated that during school hours the appellant used to press her breasts and threatened that if she discloses anything against him, that would entail serious consequences. He embraced her for about six months.

11. The prosecutrix further stated that one of the teachers Mr.Bhalerao saw the appellant embracing her. He scolded the appellant. After this incident, the prosecutrix stopped attending the school. Her mother also stopped cooking food

for appellant. Appellant shifted his residence to Nehru Nagar. The appellant started coming to paternal aunt of prosecutrix for meals. Paternal aunt of prosecutrix resides behind their house.

12. Prosecutrix, thereafter, narrated the incident of 21st December 2000 referred to above and specifically stated in her deposition that "myself and accused No.1 slept in one room on a cot whereas my mother slept outside the room".

13. She further stated that appellant removed her clothes forcibly. He also removed his clothes. Thereafter the appellant committed rape on her.

14. She then referred to the visit at Maternal uncle’s place at Chanegaon. She has also referred to the event leading to the lodging of F.I.R. and her medical examination. She stated that the Articles at Sr.Nos. 6 to 10

under the seizure panchanama are her clothes. She gave her date of birth as 7th November 1987.

15. The Advocate appearing for appellant cross examined the prosecutrix at length. She admitted therein that the appellant is handicapped. He is suffering from Polio. She admitted that prior to joining Yashoyash school, she was studying in Chandak High School, Bale. She admitted that she failed twice or thrice in Chandak high school. She further stated that Yashoyash school is a co-Ed. school and in all there were thirty students. She further states that the appellant was teaching her Maths. She stated that after his period was over some other teacher used to come in the class for teaching other subjects. The school timing was from 11.00 a.m. to 5.00 p.m. She admitted that she used to attend the school at 11.00 a.m,. and returned home at 5.00 p.m. Sometimes, she would return after 3.00 p.m. and while returning she used to

come with her friends. To a suggestion that the appellant used to collect fees from students, she said that the same is not true.

16. At para 9 of her deposition, she states thus:-

> ". I did not give any written or oral complaint against accused No.1 to anybody, after the alleged incident of embracing. It is true that I did not inform police about the incident of embracing. It is true that I did not inform police about the incident of breast pressing and embracing in my F.I.R."

17. She admits that after joining Yashoyash school she did not pay fees of the school. To a suggestion that a quarrel took place between her

brother and the appellant over payment of fees, she has denied the said suggestion. She also denied the suggestion put to her that her brother was assaulted by teachers of her school including appellant No.1. To a suggestion that she was removed from the school because she did not pay fees thereof, she denied the said suggestion so also the suggestion that her brother was having a grudge against the appellant after the prosecutrix was removed from the school.

18. She has specifically admitted that her father has left their house four years back and nobody knows his whereabouts. She is being looked after by her mother. She admits that there are several houses around the house of appellant at Nehru Nagar. She stated that she raised shouts when the appellant forcibly tied Mangalsutra and ankle chain. She had resisted and raised shouts while proceeding to Chanegaon. However, she admits that she did not inform the

people who met her on way that the appellant was taking her forcibly. To the suggestions put during the course of cross examination, she replies in the negative.

19. However, in para 13 of her deposition this is what is stated:-

> ".I had stated before police that accused No.1 used to visit house of my aunt Kaveri Namdeo Sutrave for meals. I cannot assign any reason why said fact is not mentioned in my statement. I had stated before police that in the house of maternal uncle of accused No.1 my mother slept out side the room. I cannot assign any reason why said fact is not mentioned in my statement. I had stated before police that accused No.1 removed my clothes forcibly, similarly he had removed his clothes. I cannot assign any

reason why said portion is not mentioned in my statement of F.I.R. It is not true that accused No.1 was not ready to marry me. It is not true that accused No.1 had called paternal uncle, aunt and other persons who decided not to marry me. It is not true that as accused No.1 refused to marry me, therefore myself, my brother got annoyed and angry and filed false case. It is not true that it was desire of my brother that I should marry with accused No.1 as I had given up my education."

20. She also admits that at the time of lodging F.I.R. her grandfather and brother were present at the police station. To a suggestion that she has stated before the police that she had no grievance against the appellant, she said that the same is not true. However, she admits

that some statement was made by her grandfather, which is recorded by the police. As to whether the said statement was to this effect that the grand father has no grievance against the appellant, she denies the said suggestion. To a suggestion that she has lodged a false case because the appellant refused to marry her, she denies the said suggestion.

21. It is pertinent to note that the Advocate appearing for mother of the prosecutrix also cross examined the prosecutrix and in her cross examination by the Advocate for accused No.2, she admitted that financial position of her mother is very poor. She was cooking food in two/three houses. She admits that in the morning of 21st December 2000, her mother had gone out to cook food. She once again denied the suggestion that a false case is lodged against her mother at the instance of her brother.

22. In the light of the order passed on Exh.24, further cross examination of the prosecutrix was conducted by the appellant's Advocate and in para 16, this is what is stated:-

> "16. It did not happen that myself, accused No.1 and accused No.2 had slept on one cot at Chanegaon. Portion marked "A" in my F.I.R. namely "at night myself, my mother and accused No.1 slept on one cot in the room", had not stated by me before police. I cannot assign any reason as to why said portion is mentioned in my F.I.R."

23. During the course of cross examination by the appellant's Advocate, and the mother the prosecutrix denied that she is deposing falsely against the mother to the effect that she brought her to Solapur for purchasing something but took her to Nehru Nagar bus stop.

24. The examination in chief was on 30th July 2000, whereas her cross concluded on 6th August 2002. Her statement before the police is recorded on 23rd December 2000.

25. The documents which are referred to by me as above were taken on record and marked as Exhibits.

26. The P.W.2 was one Bapurao Shankar Bhalerao, Head Master of the Yashoyash High School. It appears that he was declared hostile and the learned A.P.P. sought permission to cross examine him.

27. However, during the course of his examination in chief, the Head Master stated that the appellant was serving as a clerk cum teacher in the school and used to teach Maths and History. He was teaching students from Ist to

VIth. He admitted that the prosecutrix was studying in VIth std. in the school. Upon school leaving certificate being shown, the Head Master states that it is in his handwriting and bears his signature and contents are as per original register. He states that the same are correct and true and he verifies it. Thus, the leaving certificate is taken on record. P.W.2 has also referred to an application presented by the appellant for leave. The same was shown to him and he stated that the contents thereof are true and correct. After he stated in his examination in chief that neither the prosecutrix nor any other student reported to him the incident of embracing the prosecutrix in the class room, the A.P.P. before the trial court sought permission to declare him hostile. Thereafter, he was cross examined by the A.P.P. and also by the Appellant’s Advocate.

28. P.W.3 is one Jayashree who was in the

same class in VI std. She said during the course of her examination in chief that the appellant used to throw chalk sticks towards the prosecutrix and used to tell her that she should marry him. She goes ahead and states that the appellant used to press her breasts and she had seen the appellant telling the prosecutrix that she should marry him. She further stated in her examination in chief that the appellant told her not to disclose anything to Mr.Bhalerao. She admits that the police enquired about her and recorded her statement.

29. In the cross examination, however, she admits that the prosecutrix was residing at Ambika Nagar. P.W.3 was also residing there. She admits that her other classmates were also residing at Bale. She admits that she had not stated before the police that the appellant used to throw chalk sticks towards the prosecutrix. She admits that she did not state before the

police that the appellant asked her not to disclose the incident to Mr.Bhalerao. She specifically admitted that she used to narrate all events at the school to her elder sister. She admits that she did not lodge any complaint against the appellant regarding his alleged act. She also did not lodge any complaint against the appellant with other teachers. To the suggestion that she was deposing falsely, she denied the same.

30. P.W.4 is Arun Kadam who is P.S.I. For about 2 years, he was attached to Navipeth Police Chowki. He states that on 23rd December 2000 the prosecutrix came to lodge the F.I.R. and it was recorded by him. The F.I.R. was exhibited at Exh.15. In his examination in chief details are mentioned about registration of F.I.R. He also refers to the medical examination of both appellant and prosecutrix and seizures as above. The Panchanamas were, therefore, exhibited during

the course of his deposition. Leave application of the appellant was also exhibited together with the chemical analysts report. He further stated that he applied for addition of charge under sections 4 and 5 of Child Marriage Restraint Act.

31. During the course of cross examination by the appellant's Advocate, the said witness admitted that he had recorded statement of neighbours of appellant. He admits that at Village Bale there is police beat. To a suggestion he states that it is not true that Ambika Nagar is at a distance of five minutes from Bale. However, the distance between two places, according to him, may be 2 and 1/2 kms. P.W.3 is residing at Ambika Nagar so also prosecutrix. He admits that he has recorded statement of prosecutrix twice. He also admits that he has recorded the statement of grand father of the prosecutrix. To a suggestion that both stated before him that they have no

grievance against the appellant, he denied the said suggestion. To another suggestion that he has not recorded statement of the witness as per their say, he denies the same. He admits that P.W.1 did not state before him that appellant used to visit house of her paternal aunt Kaveri for meals. Further, in his cross examination, he states thus:-

> ". .. P.W.1 did not state before me that accused No.1 removed her clothes forcibly. Similarly, he had removed his clothes. She did not state before me that accused No.2 had slept out of the room in the house of maternal uncle of accused No.1. The P.W.1 had stated before me portion marked "A" in her F.I.R. Exh.15. Said portion is at Exh.32".

32. To a suggestion that his investigation reveals that the prosecutrix was insisting on the appellant marrying her and upon his refusal, she lodged false complaint, he denied the same. In the cross examination by the mother, appellant No.2's lawyer, he denies that the investigation had revealed that no offence is committed by mother but yet false case is registered against her.

33. These are the only witnesses examined by the prosecution. Appellant has not examined any witnesses in his defence. Similar is the position with regard to original accused No.2.

34. The learned Judge, thereafter, recorded statements of accused under section 313 of Cr.P.C. He heard arguments of learned A.P.P. on behalf of prosecution and the advocates appearing for appellant so also original accused No.2. He framed points of determination and recorded his

finding thus:-

"Point No.1: Whether the prosecution proves that on 21/12/2000 at about 10.00 a.m. at Ambika Nagar, Village Bale, Solapur, the accused in furtherance of their common intention adbucted the prosecutrix with intent that she may be compelled or knowing it to be likely that she would be compelled to marry accused No.1 against her will or in order that she may be forced or seduced to illicit inter course or knowing it to be likely that she will be forced or seduced to illicit intercourse and thereby committed offence punishable under section 366 read with Section 34 of I.P.C.?

Finding: Proved.

"Point No.2: Whether it proves that on

21/12/2002 in the house of one Parsappa Pujari at Chanegaon, Taluka Indi, Dist.Bijapur, accused No.1 committed rape on prosecutrix Bhagyashree, a minor girl aged below 16 years and thereby committed offence punishable under section 376 of I.P.C.?

Finding: Proved.

Point No.3: Whether it further proves that since six months prior to 21/12/2000 at Yashoyash School, Bale, accused No.1 used criminal force to the prosecutrix intending to outrage or knowing it to be likely that he will thereby outrage her modesty and thereby committed offence punishable under section 354 of I.P.C.?

Finding: Proved.

Point No.4: What Sentence.

As per final order."

35. Consistent with his findings, he convicted the appellant as above and sentenced him.

36. The learned Judge has specifically referred to the admission of prosecutrix in her cross examination. In so far as the offences alleged under section 366 read with 34 I.P.C., the learned Judge has concluded that even if there are omissions in the testimony of the prosecutrix, the same will not affect the truthfulness of her positive evidence. According to learned Judge, the omissions are not contrary to the theory of prosecution. They can not termed as material or of such nature so as to discard her evidence completely or destroy the

story of prosecution.

37. Insofar as the plea of the appellant that the prosecutrix was insisting on him marrying her, the learned Judge observed that he is not inclined to accept the said defence because, the prosecutrix was looked after by her mother. She had left the school. It is her mother who is more interested in performing prosecutrix's marriage as early as possible. The learned Judge in para 18 of the judgement has observed that circumstances are such that the mother wanted prosecutrix to marry the appellant and in order to perform such marriage, mother had taken the prosecutrix to the house of appellant. According to learned Judge, this story is not shattered in the cross examination and except suggestion, nothing is brought on record to establish that the mother never took the prosecutrix to the house of appellant and, thereafter to Village Chanegaon. It is in such circumstances that the

learned Judge refused to accept defence of appellant that because he refused to marry the prosecutrix, false case has been registered against him. Further, the learned Judge relies upon the fact that mother has not put anything to the prosecutrix during the course of her examination nor even any suggestion which would shatter her evidence. It was the mother who was expected to putforth her defence in order to show her strained relations with the prosecutrix, but nothing of that sort is done. She has remained silent. In such circumstances, evidence of prosecutrix on material particulars, is not shattered at all.

38. The learned Judge has observed that the prosecutrix is an innocent girl aged about 15 years. According to the prosecutrix she was about 13 years at the time of incidenrt. In his view, she has dared to file F.I.R. against her mother. The learned Judge, thereafter, observes

that from the prosecutrix version, it appears that there was intimacy between appellant and mother of prosecutrix as she used to cook food in his house. Similarly, because the appellant is teacher of prosecutrix, she also knew him very well. Thus, the prosecutrix has no animus against the appellant and other accused and there was no way that she would make false allegation by putting her character at stake. It is in these circumstances, he finds evidence of prosecutrix to be convincing and can be relied upon. Learned Judge was, thereafter, of the opinion that insofar as abduction is concerned, the defination of the term as appearing in section 362 of I.P.C. commences with the word "whoever". The word "whoever" would take in its import "parents of the abducted person as well". After relying upon the same version of the prosecutrix referred to above, the learned Judge concludes that the prosecutrix was induced by the mother on the pretext that she would purchase

something at Solapur but took her to the house of appellant and the appellant was waiting for them. In such circumstances, the charge of abduction of prosecutrix by the accused by deceitful means is established by the learned Judge.

39. Dealing with the statement that the mother of prosecutrix cannot be called as abductor, the learned Judge is of the view that marriage of a child is an offence. It is proved that the prosecutrix was taken to the house of the appellant by deceitful means and in such circumstances decision of the Rajasthan High Court relied upon by the mother’s lawyer was not applicable.

40. Learned Judge, therefore, arrived at a further conclusion that the prosecutrix was abducted with a view to perform her marriage against her wishes by compulsion and also to have intercourse with the appellant forcibly on the

pretext of the same. In such circumstances, the offences under section 366 read with 34 of I.P.C. is proved, according to learned Judge, against both.

41. Dealing with the offence of rape, learned Judge observed that in the night of 21st December 2000 at the house of Parsappa Pujari, appellant committed rape on the prosecutrix. He refers to the omissions but states that they are not material so as to affect the root of prosecution case. On the contrary, prosecutrix has described acts of accused prior to the same. Hence, part of her evidence, according to learned Judge, is explanatory to prove the incident of rape. In such circumstances, the omission will not affect the testimony.

42. With regard to medical examination and the certificate, learned Judge has recorded his finding in paras 25 to 28 of judgement.

43. The learned Judge thereafter refers to the judgements of the Supreme Court which have been rendered in rape cases. He has accepted the testimony of the prosecutrix holding that the same is reliable and convincing. It is observed by him that no enemity or animus between the accused and prosecutrix is brought on record.

44. As far as delay in lodging the F.I.R. is concerned, the learned Judge observes that the prosecutrix went to the house of her grand-father and met her brother and, thereafter, she decided to lodge F.I.R. Since she wanted to file the complaint against her mother, she might have thought it fit to consult her brother and grandfather so also considering her tender age, the learned Judge has accepted the explanation insofar as delay in lodging F.I.R. is concerned. He has termed this as reasonable, plausible and satisfactory. He has accepted the testimony of

the prosecutrix insofar as the offence of rape is concerned.

45. Insofar as the offence alleged under section 354 of I.P.C. is concerned, the learned Judge has relied upon the evidence of the witness Jayashree, P.W.3 who was also studying along with the prosecutrix in the school. As far as the omissions therein are concerned, learned Judge observes that they are not material for discarding testimony of P.W.3. Thus, relying upon this testimony, the learned Judge has proceeded to convict the appellant under section 354 of the I.P.C. and sentenced him accordingly.

46. This sums up the prosecution’s case so also the manner in which the same has been dealt with.

47. Mr.Arjunwadkar, learned Counsel appearing for appellant has contended that the judgement of

conviction and sentence rendered by the Court below is ex-facie erroenous, illegal and unsustainable. His submission is that the learned Judge could not have recorded a finding of guilt against the appellant accused. Mr.Arjunwadkar has taken me through the deposition of the prosecutrix and the charges framed against the appellant. He submits that the conviction under 3 charges is vitiated. Learned Judge has not applied his mind to some fundamental and basic aspects of the matter. He submits that for offences to be proved, the prosecution has to satisfy the court that all ingradients set out in the sections creating the offences are satisfied and there is cogent, reliable and satisfactory material placed on record in that behalf. The charges have to be proved beyond reasonable doubt. This is a criminal trial. There is no scope for any inferences or conjectures or surmises.

48. Mr.Arjunwadkar submits that the prosecutrix is residing and is under the care of her mother, who is guardian. The statement made by her have to be appreciated in these circumstances. He submitted that as far as kidnapping is concerned, there is no question of the said offence being committed when the applicant is residing along with her mother and has voluntarily accompanied her. There is no question of the appellant being involved with mother of the prosecutrix. Therefore, even if the issue of age does not arise, yet, there is no question of kidnapping, when the mother is also charged and convicted of the said offence.

49. Mr.Arjunwadkar submits that age is vital in case of rape. It was bounden duty of the prosecution to establish the age of the prosecutrix on the date of offence. Prosecution has not putforth any material as regards age of the prosecutrix. Assuming that she was 13 years

of age as claimed on 23rd December 2000, still, when she was deposing before the Court on 30th July 2002, the same age is mentioned. The prosecutrix gave her date of birth as 7th November 1987. In such circumstances, it was necessary to produce proof of age of prosecutrix/victim.

50. That apart, Mr.Arjunwadkar submits that the statement of P.W.1 is not at all reliable and trustworthy. She is a student who has failed successively and changed two schools. She has, apart from other particulars, made false statement with regard to her age also. If her date of admission to the school is taken at the normal age of six years, then having failed in 5th std. twice and being in 6th std. she is 16 years of age. He submits that judicial notice must be taken of the fact that in rural areas a child is never admitted to the school in 6th year. Hence, the age is more than 16 years.

51. Assuming without admitting that the prosecutrix was below the age of consent, even then, according to Mr.Arjunwadkar, considering the deposition of P.W.2 and relying upon the contents of Exh.22, it is clear that the version of the prosecutrix cannot be believed. It is not at all reliable. He has pointed out that she changed her version before the police completely during oral testimony. Hence, the omissions are fatal and her case is inherently improbable. She is clearly tutored by her brother who has, it has come on record, enemity against the teachers of Yashoyash High School including the appellant before this Court. The prosecutrix cannot be relied upon because her conduct is not normal. There is absolutely no truth in her version and testimony. Mr.Arjunwadkar pointed out that there is no corroboration either. Medical evidence is absolutely clear. The finding is that there is no evidence of intercourse. Learned Judge has

also admitted that medical evidence is inconclusive. The lady Doctor who has examined the prosecutrix has opined that there is no blood and no evidence of any injury on the private parts of the prosecutrix. The hymen is intact. That apart, the Medical Officer is not examined and her non examination is fatal to the prosecution case. It is unbelievable that the prosecution would not examine a lady Medical Officer, who has examined the prosecutrix. In such circumstances, there is no corroborating material to support the version of the prosecutrix insofar as rape is concerned. Hence, the finding and conviction based thereupon of the learned Judge is wholly vitiated and deserves to be quashed and set aside.

52. Mr.Arjunwadkar has assailed the findings and conclusions insofar as offences of kidnapping and outraging of modesty as well. He submits that rape presupposes sexual intercourse. There

is no evidence of sexual intercourse. Similarly, kidnapping is an offence which is committed after the ingredients which are set out in sections 366 are satisfied. He submits that insofar as outraging of modesty is concerned, once again the version of the prosecutrix is totally unreliable and untrustworthy. The Statement of P.W.3 Jayashree does not carry the prosecution case any further. The statement of Jayashree is false inasmuch as in the cross examination she has also stated that any event taking place in the school was narrated by her to her parents and her family members. This incident has not been informed by her at all either to family members or other teachers. In such circumstances and when there is no proof of the modesty being outraged in any manner, the appellant cannot be convicted under that charge either. For all these reasons the judgement needs to be set adide and the appeal be allowed and so also the appellant be set at liberty.

53. On the other hand, Mr.Mirza, A.P.P. appearing for State has supported the impugned judgement and order. In his submission, the learned Judge has relied upon the version of the prosecutrix. He invites my attention to the Judgements of the Supreme Court and submits that the prosecutrix in case of rape and molestation is a victim and not an accomplice. She is not party to the crime. If she is a victim and the crime is against the society at large, then in as held by the Supreme Court, such offences have to be sternly and strictly dealt with. Learned Judge has rightly held that omissions in the testimony of the prosecutrix are not material and it cannot be said that her version is totally unbelievable and untrustworthy. No woman or even a child of tender age would put her character at stake and level false accusations. He submits that the relationship is that of Master and pupil. A student is supposed to be guided by the

teacher/master and not treated in this manner. In such circumstances, the judgement convicting the appellant and the mother of prosecutrix should not be interfered with and the appeal be dismissed.

54. In view of the rival contentions, the only point that arises for determination in this appeal is whether the conviction and sentence of the appellant by the trial court and the charge of kidnapping, Rape and outraging of modesty of prosecutrix is liable to be set aside and interfered with or the same is in consonance with the settled principles and consistent with the materials produced on record.

55. Before proceeding further, it would be necessary to refer to the three relevant provisions carving out the offences of kidnapping, rape and outraging of modesty. Section 354 of I.P.C.reads thus:-

> "354: Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both."

56. A bare perusal of the same would demonstrate that whoever assaults or uses criminal force on any woman intending to outrage or knowing it to be likely that he will be outraging her modesty shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both. Thus, use of criminal force to any woman is the first requirement. The second is that such assault or use of criminal force must be intending to outrage or knowing it to be likely that it would outrage her modesty. That

is punishable with imprisonment as above.

57. The Supreme Court in a recent decision reported in A.I.R. 2005 S.C. 643 has observed in para 16 as under:-

> "16. The approach of the learned Trial Judge as noticed supra that ordinarily a lady would not "put her character at stake" may not be wrong but cannot be applied universally. Each case has to be determined on the touchstone of the factual matrix thereof. The law reports are replete with decisions where charges under Sections 376 and 354 of I.P.C. have been found to have been falsely advanced."

58. The very foundation of the prosecution case in all such matters is that a woman would not ordinarily put her character at stake and

level a false accusation of either her modesty being outraged or that she has been raped. However, the Supreme Court says that this principle is not of any universal application and cannot be applied in all cases. The Supreme Court says that judicial notice must be taken of false cases of both, outraging of modesty and rape in India.

59. The second charge is of kidnapping. Section 359 of I.P.C. states that kidnapping is of two kinds. Kitnapping from India and kidnapping from lawful guardianship. Section 361 deals with kidnapping from lawful guardianship. Whoever, takes or entices any minor under 16 years of age, if a male or under 18 years of age if a female or any person of unsound mind, out of the keeping of the lawful guardian such minor or person of unsound mind without the consent of such guardian is said to kidnap such minor or person from lawful guardianship. The explanation

and exception to the aforesaid provision would show that words "lawful guardian" is an inclusive concept and includes any person lawfully entrusted with the care or custody of such minor or other person. Section 362 deals with abduction which reads thus:-

> "362:- Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."

60. Thus, whoever by force compels or by any deceitful means induces any person to go from any place is said to abduct that person. The other aspect of kidnapping that is with regard to taking or maiming a minor or kidnapping or abducting in order to murder or for ransom or for wrongfully confining that person but it is not relevant for this case.

61. The learned Judge while convicting and sentencing the appellant of the charge of kidnapping referred to section 366 but has taken assistance of section 362 while convicting the mother. With great respect to him, he has overlooked fundamental distinction inasmuch as kidnapping and abduction are two distinct offences under the I.P.C. If kidnapping, abducting or inducing a woman to compel her for marriage is what the learned Judge had in mind and, therefore, he referred to section 366, then, even that provision needs to be reproduced for ready reference.

> "366:- Kidnapping, abducting or inducing woman to compel her marriage etc:- Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be

> forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid."

62. The ingredients of section 366 and for the offence to be attracted thereunder, it is apparent that any woman has to be kidnapped or abducted with intent that she may be compelled or

knowing it to be likely that she will be compelled to marry any person against her will or in order that she may be forced or seduced to illicit intercourse or knowing it likely that she may be forced or seduced to illicit intercourse, then such acts are punishable and if there is any criminal intimidation as defined in I.P.C., then the offence of the same nature is also committed and the punishment is awarded accordingly.

63. Kidnapping or abducting or inducing any woman to compel her for marriage is something covered by section 366 and it is clear that for the offences to be committed there has to be intent of compulsion or knowledge that the act would be a compulsion to marry any person against the will of that woman or a forcible illicit intercourse or seducing to such illicit intercourse. In the instant case, I would refer to this aspect in great details because once again with great respect, the learned Judge has

failed to appreciate that such ingredients referred to above being satisfied that the offence under section 366 is committed.

64. Insofar as the offence under section 354 of I.P.C. and charge in that behalf, all that the prosecutrix had to say is that during school hours the appellant used to press her breasts and was embracing her for about six months. She states that the appellant used to threaten her with dire consequences, if she disclosed anything to anybody. Thus her statement is that during school hours he used to press her breasts and was embracing her for about six months. Thereafter, she states that one day another teacher Mr.Bhalerao saw the accused committing the act of embracing her and he scolded the appellant before me. She stopped attending the school after this incident and her mother stopped cooking food for the appellant as well. In her cross examination, she admits that the appellant is handicaped and

suffers from Polio. She admits that prior to joining Yashoyash High School, she was studying in Chandak High School and she failed twice or thrice in 5th standard in that school. There are about four teachers in the school and the school is co-ed school. There are about 30 students in her class. She used to attend the school from morning till about late in the afternoon. The class which she was attending (6th std) had several subjects and time slots assigned for the same. The appellant was teaching her Mathematics. She has specifically stated and which part of her deposition, I have reproduced above, that no written or oral complaint was given by her to anybody after the alleged incident. She has admitted that she did not inform police about the incident of embracing nor does the incident of breast-pressing along with embracing finds place in her F.I.R. To a suggestion that she did not pay the school fees, she admits that the same is true. She further

admits that there is quarrel between her brother and the appellant over payment of school fees. She denies the suggestion that her brother was assaulted by the teachers of the school including the appellant. She further denies that she was removed from the school because she did not pay fees and her brother was having grudge against the appellant. She has pointed out that she is residing along with her mother and she is being looked after by her. Her father has left house for last four years and his whereabouts are not known. In para 12 of her deposition, she has denied the suggestions about her deposing falsely with regard to the alleged molestation. It is pertinent to note that her deposition is silent about any complaint made by her to mother, brother or grandfather or school authorities.

65. The only other witness with regard to this charge is P.W.3. The school Head Master, who was examiend as P.W.2. He has produced the

school leaving certificate. He was declared hostile because he did not support the charge levelled by the prosecution. That aspect need not be gone into but a perusal of the school leaving certificate shows the date of Birth as 7th November 1987 and date of entry in the school as 5th June 1999. also says that the prosecutrix left the school on 12th October 2000 and the reason for leaving the school is continuous absence.

66. P.W.3 is another girl studying in the same class as that of the prosecutrix.

67. It is pertinent to note that she does not refer to the alleged act of embracing the prosecutrix by the appellant. However, she states in her examination in chief that the appellant used to throw chalk sticks towards the prosecutrix and used to press her breasts. She was told by the appellant to marry her. P.W.3

states that she has seen the appellant telling this fact to prosecutrix. She also states that the apepllant has told her not to disclose anything to Bhalerao teacher.

68. In her cross examination, however, she admits that she did not state anything before the police about throwing chalk sticks towards the prosecutrix. She did not state before the police that the appellant had asked her not to disclose any incident to Head Master Bhalerao. She admits that she used to narrate things happening in school to her elder sister. She has not lodged any complaint against the appellant regarding the alleged acts of pressing breasts of the prosecutrix. She also admits that no complaint is lodged with regard to acts of appellant with any teacher. P.W.3 denies all other suggestions.

69. P.W.4 is the police officer who has recorded the F.I.R. In his examination in chief

insofar as the charge under section 354 is concerned, he has not referred to any statement being recorded by him of anybody concerned.

70. In such state of affairs, in my view, the version of the prosecutrix with regard to her modesty being outraged does not appear to be probable. When she was attending classes from 5th June 1999 till 12th October 2000 and when she has categorically stated that she left the school then, her vague statement that the acts of appellant were committed during school hours and she did not complain about the same to anybody, is not capable of being relied upon. It would be rather surprising that the incident and acts attributed to the appellant continuing for a long period and yet the prosecutrix attending the school and classes. She has not stated that she has disclosed these facts to her mother as well who was cooking and serving meals to the appellant. It is not as if a mother of a child

who is school going and that too in 6th std. would not be informed about all this at all. Similarly, there does not appear to be any complaint made to the head of the school or other teachers or even a protest lodged by the student. Such acts taking place in Rural areas in a school would not have gone unnoticed. Therefore, it is not possible to hold that the appellant is guilty of charge of outraging modesty of the prosecutrix. Her statement and complaint in that behalf is vague and lacks in material particulars. If she had joined the school in 6th std. and did not even complete her studies, then whether the acts were committed during school hours or outside is also not clear from her deposition. This aspect becomes clear because she attributes some acts to appellant during school hours while about others she is silent. That aspect is taken care of by P.W.3 and she states that both acts were committed during school hours. If such is the case and the

appellant accused teacher allegedly telling in presence of P.W.3, that he intends to marry the prosecutrix, then, it is but natural that the girls and students in the class as well as in the school, which does not have large number of students, would be aware of the same. More so, when P.W.3 says that all the events in the school were duly reported by her to her elder sister. Therefore, apart from the version of the prosecutrix being inherently improbable and assuming that there is something which could have been supported, there is no corroborating material and even P.W.3's version suffers from the same deficiency. In such circumstances, and when the omissions being material, then prosecution has, in my opinion, failed to bring home the charge under section 354 of I.P.C.

71. In so far as the charge under section 375 is concerned, the said provision in I.P.C. reads thus:-

"375:- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First: Against her will

Second: Without her consent

Third: With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt;

Fourthly: With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully

married;

Fifthly: With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequence of that to which she gives consent;

Sixthly: With or without her consent, when she is under sixteen years of age;

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape;

Explanation: Sexual intercourse by a man with his own, the wife not being under fifteen years of age, is not rape."

72. A man is said to have committed rape and the section says except in the cases excepted by the section, if he has sexual intercourse with a woman under circumstances falling in the description set out therein. Thus the first and foremost requirement is that there must be sexual intercourse with a woman. The explanation to section 375 states that penetration is sufficient to constitute sexual intercourse necessary for offence of rape.

73. Before the Supreme Court an issue was raised as to whether the offence, as stated in I.P.C., that is rape being a sexual offence, other types of intercourse should be brought within its purview and to the extent the same are not brought, the section becomes vulnerable, It is discriminatory and violative of the mandate of Article 21 was the submission. In another case, (Sakshi Vs. Union of India and Ors. - A.I.R.

2004 S.C. 3566) the Supreme Court was called upon to go into the precise nature of the offence and when it is said to be committed. It dealt with all aspects and after referring to the explanation, the Supreme Court has the following to observe in the above decisions:-

> "18. The main question which requires consideration is whether by a process of judicial interpretation the provisions of Section 375, I.P.C. can be so altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and object/vaginal penetration within its ambit. Section 375, uses the expression "sexual intercourse" but the said expression has not been defined. The dictionary meaning of the word "sexual

intercourse" is hetero-sexual intercourse involving penetration of the vagina by penis. The Indian Penal Code was drafted by the First Indian Law Commission of which Lord Mecaulay was the president. It was presented to the Legislative Council in 1856 and was passed on October 6, 1860. The Penal Code has undergone very few changes in the last more than 140 years. Except for clause sixthly of Section 375 regarding the age of the woman (which in view of Section 10 denotes a female human being of age) no major amendment has been made in the said provision. Sub-section (2) of Section 376 and Sections 376A to 376D were inserted by Criminal Law (Amendment) Act, 1983 but sub-section (2) of Section 376 merely deals with special types of situations and provides for a minimum sentence of 10 years. It does of

situations and provides for a minimum sentence of 10 years. It does not in any manner alter the definition of "rape" as given in Section 375, I.P.C. Similarly, Section 354 which deals with assault or criminal force to woman with intent to outrage her modesty and Section 377 which deals with unnatural offences have not undergone any major amendment."

20. Sections 354, 375 and 377, I.P.C. have come up for consideration before the superior Courts of the country on innumerable occasions in a period of almost one and a half century. Only sexual intercourse namely, heterosexual intercourse involving penetration of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute the sexual intercourse necessary for the offence of

rape has been held to come within the purview of Section 375, I.P.C. The wide definition which the petitioner wants to be given to "rape" as defined in Section 375. I.P.C. so that the same may become an offence punishable under Section 376, IPC has neither been considered nor accepted by an Court in India so far. Prosecution of an accused for an offence under section 376, I.P.C. on radically enlarged meaning of Section 375, IPC as suggested by the petitioner may violate the guarantee enshrined in Art.20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of

the offence."

74. Thus, the preliminary requirement as stipulated by the section and elaborated by the Supreme Court is that there must be sexual intercourse with a woman, committed by man and he commits the offence, if it falls within the exceptions. I need not go into the other aspects as to whether considering the age of minor in this case, the question of her consent is relevant or not. Admittedly, the law is that if the woman is under 16 years of age, then the offence is committed and her consent is immaterial and irrelevant. However, I am concerned with the first and preliminary requirement viz., whether there was a sexual intercourse at all in the facts and circumstances before me.

75. The version of the prosecutrix has been reproduced by me. The prosecutrix has admitted

in her cross examination that just as it is true that she has not complained about alleged acts of outraging her modesty, she has also not stated about anything insofar as the alleged sexual intercourse. In fact, the allegation is that the prosecutrix was told by her mother to accompany her to a particular place. She went along with her mother and her mother took her to Nehru Nagar where the appellant was allegedly waiting. She accompanied the appellant as also her mother to the place of maternal uncle of the appellant viz., Parsappa Pujari. It was her version that when she was taken to the house of the appellant, he tied a Mangalsutra around her neck and put ankle chain forcibly. Thereafter, as stated above, the appellant took her to village Chanegaon, Taluka Indi. It is clear from her version that the mother was accompanying her. In the examination in chief she says that herself and appellant slept in one room on a cot whereas her mother slept outside the room. It is

thereafter, that the alleged rape was committed. However, in her cross examination, she states that, in her statement before police, she has stated that in the house of the maternal uncle of the appellant, her mother had slept outside the room but she admits that this fact is not mentioned in the statement. She admits that before the police she stated that the appellant removed her clothes forcibly so also he removed his clothes but this fact is not mentioned in her statement or the F.I.R. In the further cross examination she has stated that it did not happen that herself, the appellant and the mother of the prosecutrix slept on one cot at Chanegaon. Her attention was specifically invited to the portion marked A in the F.I.R. and the sentence in the single inverted comas and she admits that she has not stated this fact before the police but still it is surprising as to how the same is finding place in F.I.R.

76. This is her version in court. In her statement recorded by the police on 23rd December 2000 i.e. immediately after two days after the alleged incident, the portion marked A is specifically stated. Thus, on a very material, relevant and fundamental aspect, her testimony is not at all reliable. On the other hand, it is inherently improbable, if she is to be believed that the offence of rape is committed when her mother was also sleeping along with her and the accused appellant before me, in one room. If any corroboration becomes necessary because of this, then, the other materials are also not at all of any assistance. The medical evidence is such that far from supporting the version of the prosecutrix, it would demonstrate that there is no sign of any sexual intercourse at all. At items 14 to 16 of the medical certificate, so also under the heading, General Examination, this is what is stated:-

"General Examination:-

On the body surface:-

1. Any stain	Nil
2. Any foreign body	Nil
3. Injuries	Nil

There is no injury, no tear no enthema. The discharge seen is only menstruel bleeding. The opinion is that "it is reserved and C.A. report is awaited". Insofar as the medical examination of the appellant accused is concerned, there also the findings are as below:-

"14. Age : Approx. 13 years.

"16. Secondary sex characters Physical Ht (Height) 142 cms. Weight (wt) 29 Kgs. Breast developemnt (+) Axillary Hair not developed Pubic hair not developed."

77. A lady medical officer having examined the prosecutrix and stating as above was not summoned as a witness by the prosecution. The inference that can be drawn for not summoning her is clear. Once she was not sure that the appellant had sexual intercourse with the prosecutrix, then, she was not bound to support prosecution theory. The other evidence is of P.W.4 which far from supporting the prosecution case, would demonstrate that the version cannot be relied upon. In this behalf, this is what is stated by P.W.4 in paras 7 and 8 of his deposition.

> "7. It is true that I had recorded statements of neighbours of accused No.1. It is true that at village Bale there is a police beat. It is also true that Ambika Nagar at a distance of 5 minutes from village Bale. The distance between village Bale and Ambika Nagar may be 1

1/2 km. It is true that P.W.3 Jaishree Todkari is resident of Ambika Nagar. It is true that prosecutrix is also resident of Ambika Nagar. It is true that I have recorded statement of prosecutrix twice. It is true that I had recorded statement of grand father of prosecutrix (mother's father). It is not true that prosecutrix had stated before me that she had no grievance against anybody. It is not true that the prosecutrix and her grand mother had stated before me that they had no grievance but I did not enclose said statement in the charge sheet.

8. It is not true that I am deposing falsely that I had recorded portion marked Exh.29 in the statement of Baburao Bhalerao correctly. It is not true that I am deposing falsely that I had recorded statements of witnesses as per their say.

P.W.1 Bhagyashree Sutrave did not state before me that accused No.1 used to visit house of her aunt Kaveri Sutrave for meals. P.W.1 did not state before me that accused No.1 removed her clothes forcibly. Similarly, he had removed his clothes. She did not state before me that accused No.2 had slept out of the room in the house of maternal uncle of accused No.1. The P.W.1 had stated before me portion marked "A" in her F.I.R. Exh.15. Said portion is at Exh.32. It is not true that my investigation reveals that prosecutrix was insisting accused No.1 want to marry but he refused therefore he was implicated falsely. It is not true that I filed false charge sheet against the accused."

78. It is not unusual that cases where the

version of the prosecutrix is of the present nature. Such versions have been given on prior occasion. Even this Court and the Supreme Court had before them several cases where the prosecutrix has given a version which is inherently improbable, full of material contradictions and containing vital omissions. There are cases where medical evidence is either completely lacking or if produced is so sketchy that it is not worthy of any reliance. While it is true that medical evidence is not conclusive but even if one assumes that the version of the prosecutrix can be relied upon completely and proceeds on that basis, the requirement in law is that it must be reliable and trustworthy. There must not be glaring omissions and material discrepancies. Small, irrelevant or immaterial omissions can be brushed aside but insofar as fundamental aspects of the matter are concerned, the prosecutrix is unable to prove and demonstrate that the offence was committed, then,

her version cannot be improved by bringing any other material. It is her statement which has been given great importance. It is her version and placing her in position of victim that the Supreme Court holds and observes that it can be acted upon. However, if it is not at all trustworthy, then the position is altogether different. In this case, the prosecutrix evidence read as a whole demonstrates that as regards the basic ingredient, namely, sexual intercourse, is not proved at all. She has given contradictory version before police and the court on this vital count. I find much substance in the contention of Mr.Arjunwadkar that the improvement made by the prosecutrix and her admission so also the omissions which are material in character make her testimony unbelievable. Further, the other material including spot panchanama beliees her testomony totally. It is, therefore, unsafe to accept the same.

79. Thus, insofar as the offence under section 376 of I.P.C. is concerned, even there the prosecution has failed to bring home the charge against the appellant.

80. The last aspect of the matter is kidnapping and the finding with regard thereto.

81. As far as basic facts are concerned, there is no dispute. The prosecutrix was residing along with her mother. She was residing in a house where her brother was also residing. The appellant accused was allegedly a tenant in a nearby house and her mother was cooking food for the appellant. The mother had told her that she has to accompany her, which she readily agreed and that is how she left the house on her own, along with her mother. That the mother later on took her to the house of the appellant where the appellant allegedly tied Mangalsutra and ankle

chain is the material to demonstrate that a marriage was performed. Here again, the version of the prosecutrix who has named her mother as an accused in the as well, is that her mother brought her to Solapur from Village Bale on 21st December 2000 for purchasing something. Her mother took her to Nehru Nagar bus stop where the appellant was standing. Thereafter, she was taken to appellant's house and there the alleged marriage took place. Thereafter, they went to the house of maternal uncle of the appellant where she was introduced by the appellant as his wife. The maternal uncle, thereafter took all three to the house of one Patil at Chanegaon. The said Patil asked the prosecutrix whether she is going to marry the appellant No.1 she replied that she will have to consult her brother. The said Patil thereafter sent the appellant, her mother and the prosecutrix to Solapur. Subsequently, she came to village Bale along with her mother. Thus, all through out she was with

her mother. All through out there is no reference to any marriage but the alleged act of tying Mangalsutra and ankle chain and an enquiry whether she is going to marry the appellant. Neither, the maternal uncle of the appellant nor the third party Mr.Patil of Chanegaon to whose place they were taken is examined.

82. Mother of the accused was not bound to support prosecutrix. On the other hand, she cross examined the prosecutrix through her Advocate. That apart, during the course of her cross examination by the appellant's lawyer on this aspect, she admits that there are many houses around the house of the appellant at Nehru Nagar. She states that she raised shouts when the appellant forcibly wore Mangalsutra and ankle chain. She allegedly resisted these acts of the appellant. She raised shouts while proceeding towards chanegaon. She admits that on her way she met people but she did not inform that she

was being taken away forcibly. To a suggestion by the mother than she had filed a false case against her that suggestion is denied. However, it is pertinent to note that she denies another suggestion put to her that her brother was of the opinion that she should marry the appellant as she has given up her education.

83. In my view, the offence of kidnapping or abduction is committed in the circumstances set out by me above. In the present case, there is no material on record to indicate that the prosecutrix was being kidnapped with intent that she may be compelled or knowing it to be likely that she would be compelled to marry any person against her will or in order that she may be forced or seduced to intercourse. The version of the prosecutrix does not satisfy the requirements stipulated in law. More so, when, she has all through out accompanied her mother. That she has accompanied her mother also against her wishes or

that the mother took her with intent that she may be compelled to marry the appellant against her will, or with knowledge that it is likely that she would be compelled to so married or forced to illicit intercourse is a case which is not made out from the testimony of the prosecutrix. It is that testimony alone which is there on record. It is her word which is even falsified by the fact that she accompanied her mother who is arrayed as an accused.

84. The learned Judge then, had no occasion to take recourse to section 362 and refer to the said provision with regard to a case where he frames charge specifically under section 366. Even the points which he has framed would demonstrate that he was referring to only section 366. Such being the case, he had no occasion to refer to a distinct offence of abduction. That apart, there was no occasion to go into the aspect as to the word "whoever" appearing in

section 362 would include natural guardian or not. The learned Judge was considering a case where section 366 was applied because of the fact that the prosecutrix was by force compelled or by deceitful means induced to go from any place. Such an abduction is also covered by section 366. That is how, the learned Judge possibly referred to the same. However, the charge was in the context of not forcing, compelling or by deceitful means inducing the prosecutrix to go from Bale to Solapur and to Indi thereafter. The charge was in the context of prosecutrix being taken along with the appellant by her mother to perform her marriage against her will and with that intent and knowledge. In such circumstances, by taking recourse to section 362 the case could not have been improved. That apart, the material in that behalf is only her version which the learned Judge is fully aware, is contradictory, to say the least.

85. In the aforesaid circumstances, even this charge is not brought home and proved by the prosecution.

86. In the result, the charges framed against the appellant under all three heads as aforesaid have not been proved. The judgement of the learned Sessions Judge finding the appellant guilty of the offences and convicting him for the same is vitiated. Learned Judge has overlooked the material contradictions and has believed an inherently improbable version of the prosecutrix. In such circumstances, the Judgement cannot be sustained and is liable to be set aside.

87. In the result, the appeal is allowed. The appellant is acquitted of charges and it is directed that he be set at liberty forthwith, if not required in any other case.

(S.C.Dharmadhikari, J)